No. 98-387

In the Supreme Court of the United States

OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether 18 U.S.C. 1304, which prohibits the broadcasting of advertisements for "any lottery, gift enterprise, or similar scheme," violates the First Amendment as applied to petitioners' broadcast advertisements for legal casino gambling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 149 F.3d 334. A prior opinion of the court of appeals (Pet. App. 23a-42a) is reported at 69 F.3d 1296. The opinion of the district court (Pet. App. 43a-56a) is reported at 866 F. Supp. 975.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1998. The petition for a writ of certiorari was filed on September 2, 1998, and was granted on January 15, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Section 1304 of Title 18, U.S.C., prohibits the broadcasting of "any advertisement of * * * any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." Section 1304 is part of a longstanding body of federal restrictions on interstate promotion of gambling

activities. See 18 U.S.C. 1301-1307; 39 U.S.C. 3001, 3005; see generally *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 421-423 (1993).

a. In 1868, Congress made it a crime to mail "any letters or circulars" concerning "lotteries, so-called gift concerts, or other similar enterprises." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. After briefly limiting that prohibition to illegal lotteries, Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302, Congress extended the ban in 1876 to all lotteries and related gambling enterprises, including ones chartered by state legislatures. Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90. In 1890, Congress extended the mailing prohibition from "letters or circulars" to newspapers. Anti-Lottery Act, ch. 908, § 1, 26 Stat. 465. The Court sustained the constitutionality of the 1876 statute under the First Amendment in *Ex parte Jackson*, 96 U.S. 727 (1877), and rejected a First Amendment challenge to the 1890 law in *In re Rapier*, 143 U.S. 110 (1892).

In 1895, Congress undertook to eliminate interstate lotteries altogether by prohibiting the transportation of lottery tickets in interstate or foreign commerce. Act of Mar. 2, 1895, ch. 191, 28 Stat. 963. In *Champion* v. *Ames*, 188 U.S. 321 (1903) (*Lottery Case*), the Court held the prohibition on interstate transportation of lottery tickets to be within the power of Congress under the Commerce Clause. In its opinion, the Court summarized the policies behind federal anti-lottery laws. The Court explained that lotteries were regarded by Congress as a "widespread pestilence." *Id.* at 356. The Court concluded that Congress "shared the views" that a lottery is pernicious because it "enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; [and] it plunders the ignorant and simple." *Id.* at 355, 356. In addition, States that had themselves banned lotteries required congressional

assistance to deal with the interstate aspects of lotteries. Congress "said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce." *Id.* at 357. Thus, Congress had validly acted both to protect the public against the social ills associated with lotteries and to reinforce the efforts of anti-lottery States.

b. In the Communications Act of 1934, Congress extended the existing federal restriction on the interstate distribution of gambling advertising from print to broadcast media. Section 316 of the Communications Act, which prohibits broadcast licensees from airing advertisements for any "lottery, gift enterprise, or similar scheme," Ch. 652, § 316, 48 Stat. 1088, is now codified as amended at 18 U.S.C. 1304.

Although Section 1304 is a criminal statute, it traditionally has not been enforced through criminal prosecutions. Instead, enforcement has been carried out administratively by respondent Federal Communications Commission (FCC), which has general responsibility for regulating television and radio broadcasting under the Communications Act. The FCC has adopted a regulation (47 C.F.R. 73.1211) that parallels Section 1304, and it can impose a variety of administrative sanctions for violations of the regulation, including monetary forfeitures and license revocation. See 47 U.S.C. 312(a)(6), 503(b)(1)(D) and (2)(A).

Section 1304 is not confined to lotteries but applies to broadcast advertisements for any "lottery, gift enterprise, or similar scheme." In *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 290 (1954), this Court construed "lottery, gift enterprise, or similar scheme" to encompass any undertaking involving: "(1) the distribution of prizes; (2) ac-

cording to chance; (3) for a consideration." Because virtually all casino gambling involves "the distribution of prizes" (money), "according to chance," "for a consideration" (the gambler's wager), the FCC has treated casino gambling as a form of "lottery, gift enterprise, or similar scheme." As indicated below, Congress has likewise proceeded on the understanding that advertising for casino gambling is subject to Section 1304, and petitioners do not dispute that understanding in this Court.

2. Since the enactment of the Communications Act, Congress has amended Section 1304 on several occasions to permit broadcast advertising of specific types of gambling. However, Congress has expressly declined to permit broadcast advertising of private commercial casino gambling.

a. In 1950, Congress amended Section 1304 and related provisions to permit advertising of non-profit fishing contests. Act of Aug. 16, 1950, ch. 722, 64 Stat. 451 (codified at 18 U.S.C. 1305). Congress did so on the ground that fishing contests are "innocent pastimes" that are "far removed from the reprehensible type of gambling activity which it was paramount in the congressional mind to forbid." S. Rep. No. 2242, 81st Cong., 2d Sess. 2 (1950).

b. During the late 1960s and early 1970s, a growing number of States began to conduct lotteries to raise money for government programs. In 1975, Congress amended the federal gambling statutes to take account of the growth of state-run lotteries. Congress sought to accommodate the promotion of state-run lotteries within lottery States while simultaneously continuing to discourage participation by residents of non-lottery States. See S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974); H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974). To accomplish that, Congress allowed the broadcasting

of advertisements for a state-run lottery "by a radio or television station licensed to a location in that State or a State which conducts such a lottery." 18 U.S.C. 1307(a)(1)(B). Congress also made corresponding changes in the restrictions on lottery-related mail and interstate commerce. 18 U.S.C. 1307(a)(1)(A) and(b)(1).

Although the 1975 legislation permits broadcast advertising of state-run lotteries in States that conduct lotteries, broadcast advertising of state-run lotteries remains unlawful in States that do not. In *Edge*, *supra*, this Court rejected a challenge to the constitutionality of Section 1304 as applied to a broadcaster in a non-lottery State that wished to broadcast advertisements for an adjacent State's lottery. The Court held that Section 1304's prohibition of broadcast advertising in non-lottery States does not violate the First Amendment. 509 U.S. at 426-436.

c. Like state governments, Indian tribes have come to rely on gambling as a source of public revenue. See 25 U.S.C. 2701(1); S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988). Congress "views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services." *Id.* at 12. To accommodate the governmental interests of the Nation's Indian tribes, while simultaneously responding to concerns about potential criminal infiltration and other problems, Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. 2701 *et seq.*); see generally *Seminole Tribe* v. *Florida*, 517 U.S. 44, 48-50 (1996). In order to "promot[e] tribal economic development" (25 U.S.C. 2702(1)), IGRA authorizes various forms of Indian gambling, including casino gambling conducted in conformance with tribal-state compacts. IGRA further exempts "any gaming conducted by an Indian

tribe pursuant to this [Act]" from Section 1304's prohibition on broadcast advertising. 25 U.S.C. 2720.

IGRA also substantially tightens government oversight of Indian gambling by subjecting certain types of gambling to direct federal regulation and other types of gambling to regulatory compacts between Indian tribes and States. 25 U.S.C. 2704-2706, 2710-2713. Casino gambling is classified under IGRA as "Class III gaming," which is "the most heavily regulated of the three classes" of authorized gambling. *Seminole Tribe*, 517 U.S. at 48; see generally 25 U.S.C. 2710(d) (requirements for Class III gaming). To ensure that the revenues from gambling are used solely for public purposes, IGRA requires that net revenues be devoted exclusively to funding tribal governments, local government agencies, and charitable organizations; to promoting tribal economic development; or to providing for the welfare of the tribes and their members. 25 U.S.C. 2710(b)(2)(B), (d)(1)(A)(ii) and (2)(A).

d. Congress further modified the operation of Section 1304 by enacting the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (codified principally at 18 U.S.C. 1307(a)). That Act removes federal advertising restrictions on legal lotteries run by charitable groups and by "governmental organization[s]" other than the state-run lotteries already covered by the 1975 legislation. See 18 U.S.C. 1307(a)(2)(A). The Act also lifts advertising restrictions on "occasional and ancillary" promotional lotteries, such as a car dealership drawing for a new car. 18 U.S.C. 1307(a)(2)(B); see 134 Cong. Rec. 31,075 (1988) (Senate Judiciary Committee report) (giving examples of promotional lotteries).

As originally proposed, the 1988 legislation would have removed advertising restrictions on all gambling allowed under state law, including legal commercial

casino gambling. See 134 Cong. Rec. 12,278-12,280 (1988). However, the House of Representatives adopted an amendment to the bill specifically to leave Section 1304 undisturbed with respect to casino gambling. *Id.* at 12,280-12,282. The Senate subsequently redrafted the bill to accomplish the same result. *Id.* at 31,073-31,076. In its report on the bill, the Senate Judiciary Committee stated that "no provision of [the bill] is intended to change current law as it applies to interstate advertising of professional gambling activities." *Id.* at 31,075.

e. Broadcast advertising relating to betting on sporting events is not restricted by Section 1304. However, most sports betting and advertising of sports betting are prohibited by the Professional and Amateur Sports Protection Act, 28 U.S.C. 3701 *et seq.* Parimutuel animal racing and jai-alai are excepted from that Act's prohibitions, as are certain pre-existing state-run and state-authorized operations. See 28 U.S.C. 3704(a).

3. a. Petitioners are the Greater New Orleans Broadcasting Association (GNOBA) and individual members of the association. GNOBA's members wish to broadcast promotional advertisements for legal commercial casino gambling conducted in Louisiana and Mississippi. Under appropriate conditions, broadcast signals from Louisiana broadcasting stations may be heard not only in Louisiana, but also in adjoining States, including Texas and Arkansas, which prohibit casino gambling. Reply in Supp. of Def.'s Cross-Mot. for Summ. J., Decl. of Robert D. Greenberg ¶ 4.

Petitioners filed suit against respondents in February 1994 in the United States District Court for the Eastern District of Louisiana. Petitioners asserted that Section 1304 does not prohibit broadcast advertising for legal casino gambling and, alternatively, that the application of Section 1304 to advertisements

for legal casino gambling violates the First Amendment and other constitutional provisions. Compl. ¶¶ 13, 36-44. Petitioners asked the district court to enjoin the enforcement of Section 1304 against them and to declare that Section 1304 is unconstitutional "as so construed and applied to" them. *Id.*, Relief Requested ¶¶ B and C.[1]

Petitioners' First Amendment challenge was based on the commercial speech principles of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and its progeny. Under *Central Hudson*, a legislative limitation on commercial speech is subject to a four-part inquiry: first, whether the speech "accurately inform[s] the public about lawful [commercial] activity," *id.* at 563; second, "whether the asserted governmental interest [underlying the speech regulation] is substantial," *id.* at 566; third, "whether the regulation directly advances the governmental interest asserted," *ibid.*; and, finally, "whether it is not more extensive than is necessary to serve that interest" (*ibid.*). Petitioners asserted that they intend to broadcast truthful advertisements for lawful casino gambling, thereby bringing their advertising within the ambit of the First Amendment under the first *Central Hudson* inquiry, and that the application of Section 1304 to their advertising fails to satisfy each of *Central Hudson's* remaining inquiries.

Petitioners and the government filed cross-motions for summary judgment regarding the constitutionality

[1] Petitioners also challenged the constitutionality of 47 C.F.R. 73.1211, the FCC regulation that parallels Section 1304. There are no material differences between the terms of the FCC regulation and Section 1304 itself, and petitioners did not assert that the FCC regulation stands in a different position from Section 1304 with respect to their First Amendment claim.

of Section 1304. The district court entered summary judgment in favor of the government, holding that the application of Section 1304 to petitioners' proposed casino gambling advertisements satisfies the constitutional standards of *Central Hudson*. Pet. App. 43a-56a. On appeal, the Fifth Circuit affirmed. Pet. App. 23a-37a.

b. Petitioners then filed a petition for a writ of certiorari. *Greater New Orleans Broad. Ass'n* v. *United States*, No. 95-1708. While the petition was pending, this Court decided *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996).

In *44 Liquormart*, the Court held that two Rhode Island statutes prohibiting the advertising of retail liquor prices violated the First Amendment. Four Members of the Court proposed departing from the basic framework of *Central Hudson* by applying more "rigorous" judicial review to advertising restrictions intended to reduce public demand for a lawful product or service. See 517 U.S. at 501-504 (Stevens, J., joined by Kennedy & Ginsburg, JJ.); *id.* at 518 (Thomas, J., concurring in part and concurring in the judgment). A majority of the Court, however, declined to depart from the framework established by *Central Hudson*. See *id.* at 528 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment); *id.* at 518 (Scalia, J., concurring in part and concurring in the judgment). Nonetheless, the Court did reject elements of its earlier commercial speech decision in *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which had sustained the constitutionality of a Puerto Rico statute restricting casino gambling advertising, and the Court clarified the requirements of *Central Hudson* in several other respects. See 517 U.S. at 508-514 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.); *id.* at 529-532

(O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment).

c. In light of its intervening decision in *44 Liquormart*, the Court vacated the Fifth Circuit's original decision and remanded for further consideration. On remand, the Fifth Circuit again sustained the constitutionality of Section 1304. Pet. App. 1a-19a. Chief Judge Politz dissented. *Id.* at 20a-22a. Because petitioners' intended advertising is assumed to be truthful, and because the court regarded the governmental interests underlying Section 1304 as unquestionably substantial, the court directed its attention on remand principally toward the final two components of the *Central Hudson* analysis.

With respect to the third *Central Hudson* component, the court of appeals reasoned that Section 1304's prohibition on promotional advertising has a more direct and obvious impact on consumer demand than the restrictions on price advertising in *44 Liquormart*, which affected demand only indirectly. Pet. App. 8a-9a. The court also found "no doubt" that Section 1304 "reinforces the policy of states, such as Texas, which do not permit casino gambling." *Id.* at 10a. The court acknowledged that Congress has enacted exceptions to Section 1304, but held that "[t]he government may legitimately distinguish among certain kinds of gambling for advertising purposes, determining that the social impact of activities such as state-run lotteries, Indian and charitable gambling include social benefits as well as costs and that these other activities often have dramatically different geographic scope." *Id.* at 9a-10a.

Turning to the fourth part of the *Central Hudson* test, the court of appeals recognized that "[a]fter *44 Liquormart*, * * * the fourth-prong 'reasonable fit' inquiry * * * has become a tougher standard for the

[government] to satisfy." Pet. App. 10a. Applying that "tougher standard," the court held that Section 1304 "cannot be considered broader than necessary to control participation in casino gambling." *Id.* at 16a. The court pointed out that Section 1304, unlike the Rhode Island statutes struck down in *44 Liquormart*, does not ban all forms of advertising; instead, it "targets the powerful sensory appeal of gambling conveyed by television and radio, which are also the most intrusive advertising media, and the most readily available to children," while permitting intrastate advertising in other media. *Ibid.* The court also pointed out that, although the indirect technique of restricting price advertising that Rhode Island employed in *44 Liquormart* was obviously less effective than direct regulatory means of reducing alcohol consumption, "regulation of promotional advertising directly influences consumer demand," and the effectiveness of non-advertising means of discouraging demand for casino gambling is speculative. *Id.* at 16a-17a.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 60 years, 18 U.S.C. 1304 has restricted the use of broadcast media for the commercial promotion of gambling activities. The court of appeals correctly held that Section 1304's longstanding restriction on the broadcasting of advertisements does not violate the First Amendment as applied to petitioners' broadcast advertisements for private casino gambling.

Under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and its progeny, Section 1304's application to petitioners' advertisements is subject to a four-part inquiry. The parties do not dispute the answer to the first part of that inquiry—we assume petitioners' advertisements are accurate and concern a lawful commercial activity.

The first question for the Court is therefore whether the interests that the government asserts in support of Section 1304 are substantial ones. Every court that has considered that question has concluded that the government has substantial interests in reducing the social costs associated with gambling and in assisting States that restrict gambling within their own borders and wish to protect their citizens from the harms incurred by gambling in other jurisdictions. Those interests, which motivated the original federal limitations concerning gambling, are equally valid today. Gambling creates significant social costs, including the devastating effects of compulsive gambling and the criminal activity associated with gambling. And States that prohibit casino gambling cannot protect their residents from the harms of casino gambling in other jurisdictions without federal assistance.

The next question for the Court is whether Section 1304 directly and materially advances the government's interests. The statute does so in two ways. First, it reduces gambling and its consequent social ills by limiting advertising in the most powerful media available to convey gambling's allure—television and radio. Second, it assists States that prohibit casino gambling by shielding their residents from broadcasts advertising casino gambling in neighboring jurisdictions. The statutory exceptions that Congress has enacted do not prevent Section 1304 from advancing the government's interests. In each instance, the exceptions involve forms of gambling that either pose a lesser risk of social harm or offer substantial countervailing social benefits.

The final question is whether Section 1304 is more extensive than necessary to serve the government's interests. It is not. Petitioners' speculation about the possible efficacy of regulatory alternatives that do not

restrict speech falls well short of showing that Section 1304 is substantially overbroad.

ARGUMENT

THE APPLICATION OF 18 U.S.C. 1304 TO BROADCAST ADVERTISEMENTS FOR LEGAL CASINO GAMBLING DOES NOT VIOLATE THE FIRST AMENDMENT

From its inception, Section 1304 has served two basic purposes: to reduce the well-recognized social costs associated with gambling activities by reducing public demand for those activities and to provide assistance to States that restrict gambling within their own borders and wish to protect their citizens against the harms incurred by gambling in other jurisdictions. Congress has modified the original advertising prohibition to accommodate particular kinds of gambling, such as state-run lotteries, Indian gambling, and charitable gambling, that Congress reasonably regards as posing fewer underlying risks or providing countervailing public benefits. But, with respect to commercial casino gambling, which accounts for nearly 40% of all gambling revenue in the United States, Congress has found it appropriate to maintain the prohibition on broadcast advertising. The First Amendment does not prohibit Congress from regulating casino gambling advertising in that fashion.

I. Substantial Government Interests Underlie Section 1304

Petitioners have not questioned the continued validity of the analysis that this Court set out in *Central Hudson*, but rather argue that Section 1304 does not pass muster under that analysis.[2] Because

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[2] Amicus American Advertising Federation (AAF) argues for strict scrutiny of restrictions on commercial speech. AAF con-

petitioners challenge the constitutionality of Section 1304 solely with respect to truthful and non-misleading advertising about lawful casino gambling, the constitutional inquiry in this case begins with the question

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tends (Br. 5-24) that the historical record shows an understanding at the time of the adoption of the First and Fourteenth Amendments that truthful speech about lawful commercial transactions was not subject to government regulation. The relevance of the historical understanding at the time of the Fourteenth Amendment is unclear, because this case (unlike *44 Liquormart*) involves a speech regulation imposed by the federal government, which is not subject to the Fourteenth Amendment. In any event, the historical evidence does not support AAF's contention. As AAF acknowledges (Br. 14), many state statutes in the late 18th century prohibited the advertisement of lotteries. AAF incorrectly asserts (*ibid.*) that those statutes prohibited only advertisements of illegal lotteries. To the contrary, the statutes often prohibited advertisements of all lotteries other than those run by the State or the United States, and thus prohibited (sometimes explicitly) advertisements of *legal* lotteries operated by other States. See, *e.g.*, Act for Suppressing and Preventing of Private Lotteries, 1762 S.C. Acts, No. 926 (criminalizing advertisements of "any lottery to be drawn out of this Province" and "any foreign or other lottery"); Act to Prevent Private Lotteries, 1783 N.Y. Laws, ch. 12 (criminalizing promotion of any lottery "other than such as shall be authorized by the legislature"); see also 1860 Md. Laws, art. 30, § 118 (criminalizing advertising of "all lotteries, whether authorized by any other State, district or territory, or by any foreign country"). Even if AAF were correct that state legislatures did not generally regulate truthful speech about lawful commercial transactions at the time of the adoption of the First Amendment, AAF offers virtually no evidence that "the *reason* [that such regulation] was not engaged in" was that "it was thought to violate the right" embodied in the First Amendment. See *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., joined by the Chief Justice, dissenting). The failure to employ commercial speech restrictions for regulatory purposes could reflect instead the more general absence, in the late 18th century, of the regulatory programs that characterize modern government. Cf. *id.* at 374.

"whether the asserted governmental interest[s]" underlying Section 1304 are "substantial" ones. *Central Hudson*, 447 U.S. at 566. That question has been answered affirmatively by every court that has addressed the constitutionality of Section 1304, even those that have gone on to sustain First Amendment challenges to Section 1304 on other grounds. See Pet. App. 28a-31a (Jones & Parker, JJ.); *id.* at 38a (Politz, C.J., dissenting); *Valley Broad. Co.* v. *United States*, 107 F.3d 1328, 1331-1333 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998); *Players Int'l, Inc.* v. *United States*, 988 F. Supp. 497, 501-504 (D.N.J. 1997), appeal pending, No. 98-5127 (3d Cir.). Petitioners offer no reason for this Court to "disagree with the accumulated, commonsense judgments" of Congress and "the many reviewing courts"—judgments supported by ample evidence—that the governmental interests at stake here are "real and substantial." *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 509 (1981) (plurality opinion).

A. Reducing The Social Costs Of Casino Gambling

1. Congress enacted the original federal anti-lottery statutes based on its judgment that lotteries and similar gambling activities impose pervasive and potentially destructive costs on society. In this Court's words, Congress concluded that "the widespread pestilence of lotteries * * * infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." *Lottery Case*, 188 U.S. at 356. Similarly, Section 1304 and related federal statutes (see pp. 1-7, *supra*) today reflect Congress's considered and long-standing judgment that gambling contributes to corruption and the growth of organized crime; that it underwrites bribery, narcotics trafficking, and other crimes; that it imposes a regressive tax on the poor, the

persons who are least able to bear that burden; and that it offers a false but sometimes irresistible hope of financial advancement. Section 1304 is designed to reduce those social ills by discouraging public participation in casino gambling and other forms of "lotter[ies], gift enterprise[s], [and] similar scheme[s]." When supporters of the casino gambling industry sought unsuccessfully to amend Section 1304 in 1988 to allow casino gambling advertising (see pp. 6-7, *supra*), the social costs of gambling, and the role of Section 1304 in limiting those costs, were specifically advanced as grounds for rejecting the proposed change. See 134 Cong. Rec. 12,281 (1988) (Rep. Wolf).

Many of the social costs associated with casino gambling involve compulsive gambling, a recognized psychological disorder that is referred to clinically as "pathological gambling." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* § 312.31, at 615-618 (4th ed. 1994) (*reprinted in* Gov't Lodging (GL) 180-184).[3] The National Council on Problem Gambling has estimated that at least 3 million Americans are compulsive gamblers, and other estimates are comparable. See *id.* at 617; *Pathological Gambling*, 12 Harv. Mental Health Letter (Harv. Med. Sch., Boston, Mass.), Jan. 1996, at 1; *National Gambling Impact and Policy Commission Act: Hearing on H.R. 497 Before the House Comm. on the Judiciary* (*Gambling Hearing*), 104th Cong., 1st Sess. 91 (1995) (statement of Paul R. Ashe, President, National Council on Problem Gambling, Inc.) (GL 183, 185, 193). Compulsive gambling behavior is primarily associated with

[3] This document and many others cited in this brief are reproduced in the court of appeals' appendix in *Players International, Inc.* v. *United States*, No. 98-5127 (3d Cir.), copies of which have been lodged with the Court.

forms of gambling that permit "continuous" play, such as slot machines and other forms of casino gambling. Dickerson, *Gambling: A Dependence without a Drug*, 1 Int'l Rev. of Psychiatry 157, 159 (1989); Lester, *Access to Gambling Opportunities and Compulsive Gambling*, 29 Int'l J. Addictions 1611, 1612 (1994) (state-by-state prevalence of Gamblers Anonymous chapters is positively correlated with casinos, legalized card rooms, and slot machines, but not with charitable gambling and most forms of simple state lotteries) (GL 270, 284). Although only a relatively small percentage of gamblers engage in compulsive gambling behavior, it has been estimated that compulsive gamblers account for a disproportionate share of casino revenues. *Gambling Hearing* at 373, 381 (more than 50% of casino revenues) (GL 249, 257).

The incidence of compulsive gambling has grown in step with the nationwide expansion of legalized gambling. *Gambling Hearing* at 105; Lesieur & Custer, *Pathological Gambling: Roots, Phases, and Treatment* (*Pathological Gambling*), 474 Annals Am. Acad. Pol. & Soc. Sci. 146, 148-149 & n.15 (July 1984); Politzer et al., *The Epidemiological Model and the Risks of Legalized Gambling: Where Are We Headed?*, 16 Health Values 20, 23-24 (Mar./Apr. 1992) (GL 207, 294-295, 308-309). In Iowa, for example, the estimated percentage of compulsive gamblers among the adult population grew from 1.7% in 1989, before the State legalized riverboat gambling, to 5.4% in 1995. *Pathological Gambling* at 1-2 (GL 185-186). And the problem is at least as severe among youth: a review of nine studies of adolescent gambling in North America found a 5.4% rate of compulsive gambling. *Ibid.*

Estimates of the purely economic costs of compulsive gambling amount to billions of dollars annually. See, *e.g.*, Politzer et al., *supra*, at 24 (estimated cost of $80

billion in 1988); *Dead Broke*, Minneapolis Star Tribune, Dec. 3, 1995, at A18 (estimated annual cost of $300 million in Minnesota alone) (GL 309, 321). Non-economic costs associated with compulsive gambling are, if anything, even more grave. See, *e.g.*, Gaudia, *Effects of Compulsive Gambling on the Family*, 32 Soc. Work 254 (May/ June 1987); Dickerson, *supra*, 1 Int'l Rev. of Psychiatry at 161-163 (GL 335-337, 272-274). For each compulsive gambler, an estimated 10 to 17 people are affected by the gambler's problems. Politzer et al., *supra*, at 25 (GL 310). For the compulsive gambler himself, the toll includes deteriorating relations with family, depression, and in some cases, suicide; for the compulsive gambler's family, the toll includes emotional turmoil, stress-related diseases, lack of financial support, neglect, abuse, and divorce. *Gambling Hearing* at 91, 106-108; Harden & Swardson, *Addiction: Are States Preying on the Vulnerable?*, Washington Post, Mar. 4, 1996, at A8; Murray, *Review of Research on Pathological Gambling*, 72 Psychol. Rep. 791, 794 (1993) (GL 193, 208-210, 292, 341). The children of compulsive gamblers are particularly vulnerable: they perform worse academically than their peers, are more likely to have alcohol, gambling, or eating disorders, and are more likely to be depressed and attempt suicide. *Gambling Hearing* at 106; Dickerson, *supra*, 1 Int'l Rev. of Psychiatry at 162; Jacobs et al., *Children of Problem Gamblers*, 5 J. Gambling Behav. 261, 261-268 (Winter 1989) (GL 208, 273, 359-366).[4]

[4] Contrary to petitioners' suggestion (Br. 19-21), the government's interest in reducing compulsive gambling is fully consistent with its interest in reducing demand for casino gambling. Compulsive gambling is one of the more costly social problems associated with casino gambling; and the goal of reducing compulsive gambling is a significant, subsidiary component of the broader goal of reducing the social costs of casino gambling. Nor is the government disabled from relying on compulsive gambling (*id.* at 19-20) because the government did not focus on that particular aspect of gambling's social ills until the remand following the initial court of appeals decision in this case. Indeed, the government may defend a restriction on commercial speech by relying on an interest entirely different from the one asserted when the restriction was enacted. See *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983). Finally, contrary to the suggestion of amicus National Association of Broadcasters et al. (NAB) (Br. 14), the goal of reducing compulsive gambling and the social costs it imposes is not rendered insubstantial because compulsive gamblers are a minority of the population. Such a principle would call into question the validity of interests that the Court has repeatedly recognized as substantial, such as the interest in protecting children. See, *e.g.*, *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 749 (1978). Moreover, the social costs of compulsive gambling fall on many additional persons (see p. 18, *supra*) and ultimately on the government as well.

In addition to providing both a stimulus and an outlet for compulsive gambling, casinos have traditionally been a lure for organized crime and other kinds of criminal activity. As this Court noted, "the vast amount of money that flows daily through a casino operation and the large number of unrecorded transactions make the [casino] industry a particularly attractive and vulnerable target for organized crime." *Brown* v. *Hotel Employees Local 54*, 468 U.S. 491, 495 (1984). Congress has repeatedly noted the attraction of casino gambling for organized crime and has been presented with evidence documenting that relationship. See, *e.g.*, Congressional Statement of Findings and Purpose Preceding the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-923, 18 U.S.C. 1961 note; *Message From the President of the United States Relative to the Fight Against Organized Crime*, H.R. Doc. No. 105, 91st Cong., 1st Sess. 5-6 (1969); S. Rep. No. 617, 91st Cong., 1st Sess. 71 (1969); President's

Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 2 (1967); President's Comm'n on Organized Crime, *Interim Report to the President and the Attorney General—The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 51 (1984); President's Comm'n on Organized Crime, *Record of Hearing VII: Organized Crime and Gambling* (1985) (GL 47-97).

Casino gambling is also associated with other criminal activity, such as street crime and white collar crime. See, *e.g.*, Curran, *The House Never Loses and Maryland Cannot Win: Why Casino Gaming Is a Bad Idea* (1995) (GL 106-179); Kindt, *U.S. National Security and the Strategic Economic Base: The Business/ Economic Impacts of the Legalization of Gambling Activities*, 39 St. Louis U. L.J. 567, 579-580 & n.96 (Winter 1995); Nat'l Opinion Research Ctr., *Overview of National Survey and Community Database Research on Gambling Behavior* (*NORC Report*) 62, 67 (1999).

In *Posadas*, this Court held that the government interest in minimizing the social ills of gambling, particularly casino gambling, is a substantial one. In *Posadas*, the Puerto Rico legislature legalized casino gambling but prohibited casinos from directing gambling advertisements at residents of Puerto Rico. See 478 U.S. at 331-336. The Court held squarely that there is a substantial governmental interest in reducing demand for casino gambling:

> The interest at stake in this case * * * is the reduction of demand for casino gambling by the residents of Puerto Rico. * * * [The legislature] belie[ved] that "[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." These are some of the very same concerns, of course, that have motivated the vast majority of the 50 States to prohibit casino gambling. We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a "substantial" governmental interest.

Id. at 341 (internal citation omitted).

As noted above, the Court's recent decision in *44 Liquormart* rejects other aspects of the Court's reasoning in *Posadas*. In particular, the Court repudiated *Posadas*'s holding that the First Amendment gives legislatures free rein to choose between commercial speech restrictions and regulatory alternatives that do not restrict speech. See *44 Liquormart*, 517 U.S. at 509-510 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.); *id.* at 531-532 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment). But nothing in *44 Liquormart* casts doubt on the continued vitality of the holding in *Posadas* that the government's interest in reducing the social costs of casino gambling is substantial.

As described at p. 18, *supra*, the costs of casino gambling fall not only on gamblers themselves, but also on their families, their employers, and their communities. See also 134 Cong. Rec. 12,281 (1988) (Rep. Wolf); *NORC Report* at 33-38. As a result of those "negative externalities," see, *e.g.*, *McCloud* v. *Testa*, 97 F.3d 1536, 1551 n.21 (6th Cir. 1996), the government's interest in discouraging public participation in casino gambling is not a mere exercise in "paternalism." Instead, the gov-

ernment has an interest in protecting society at large from the public harms caused by that private activity.

2. Petitioners do not dispute the significant social costs caused by casino gambling or the continued validity of the holding in *Posadas* that the government's interest in minimizing those costs is substantial. Instead, they incorrectly assert (Pet. Br. 19) that only *state* governments have a cognizable interest in addressing the social costs of casino gambling, and the federal government must defer to States such as Louisiana that have chosen to permit casino gambling.

It is well established, however, that Congress may use its Commerce Clause powers to "legislat[e] against moral wrongs." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257 (1964). "The power to regulate commerce is plenary, and once the power exists it is for Congress, not the courts, to choose the ends for which its exercise is appropriate." *United States* v. *Helsley*, 615 F.2d 784, 787 (9th Cir. 1979) (Kennedy, J.) (internal citation omitted). See *United States* v. *Darby*, 312 U.S. 100, 115 (1941). "The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." *United States* v. *Rock Royal Coop.*, 307 U.S. 533, 569-570 (1939). As a result, "it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 147 (1938).

Congress has regulated gambling and activities connected with it for more than 100 years. See p. 2, *supra*. Indeed, one of the first cases to recognize Congress's power to legislate against social ills under the Commerce Clause was the *Lottery Case* itself. The Court there held that, just as a State may restrict

lottery activities within its borders "for the purpose of guarding the morals of its own people," so may Congress restrict interstate lottery activities "for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries.'" 188 U.S. at 357. Thus, if a State may assert a legitimate and substantial interest in reducing the social costs of gambling by regulating *intrastate* gambling advertising, as the Court held in *Posadas*, the federal government may assert an equally legitimate and substantial interest in reducing the same costs by regulating *inter*state advertising under the Commerce Clause.

The suggestion that the federal government must defer to the policy judgments of States that have chosen to legalize casino gambling stands the constitutional relationship of the federal government and the States on its head. Congress has plenary authority under the Commerce Clause to regulate interstate commerce, and broadcast advertising is the quintessence of interstate commerce. See *Fisher's Blend Station, Inc.* v. *State Tax Comm'n*, 297 U.S. 650, 655 (1936) ("By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause."). If Congress chooses to exercise its constitutional authority over interstate commerce in ways that may undermine the policies of particular States, the Supremacy Clause dictates that the federal government's policy choices must prevail. Indeed, when Congress regulates private conduct under the Commerce Clause, the federal policy underlying Congress's enactments *becomes* state policy. See *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 57 (1912).

3. Petitioners are also mistaken in arguing (Br. 19) that the statutory exceptions to Section 1304 (see pp. 4-

7, *supra*) "preclude[] a finding * * * that the Government has a substantial interest in suppressing legal gaming." The contention that the exceptions prevent the accomplishment of that interest bears not on whether the interest is substantial (the second *Central Hudson* inquiry), but on whether the statute directly advances that interest (the third *Central Hudson* inquiry). As we show below (see pp. 37-43, *infra*), the exceptions to Section 1304 do not prevent Section 1304 from directly advancing the government's interests. But whether or not they do, the exceptions are irrelevant to whether those interests are substantial.

The Court's decision in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), illustrates the point. As discussed more fully below, the Court held in *Coors* that a federal restriction on beer labeling failed to advance the government's interest in preventing competition among brewers based on alcohol strength because "exemptions and inconsistencies * * * ensure[d] that the labeling ban w[ould] fail to achieve that end." *Id.* at 489. The existence of those "exemptions and inconsistencies" did not, however, prevent the Court from holding that the government's interest in discouraging strength wars was a substantial one, a conclusion the Court reiterated when discussing the statute's various exceptions. See *id.* at 485, 489.

Petitioners' argument that the exceptions logically contradict the existence of the asserted federal interest erroneously presupposes that there are no material differences between the gambling activities for which broadcast advertising is prohibited and the gambling activities for which broadcast advertising is allowed. To the contrary, the statutory exceptions reflect Congress's considered judgment that the kinds of gambling that may be advertised either do not pose the same

risks as private casino gambling or provide countervailing public benefits that commercial casino gambling does not produce. And, as explained below, the legislative judgments that underlie the statutory exceptions to Section 1304 are entirely legitimate ones (see pp. 37-40, *infra*).

4. Although petitioners do not dispute the social costs associated with casino gambling, amicus American Gaming Association (AGA) asserts that casino gambling "[d]oes [n]ot [p]roduce [s]ubstantial[] [h]armful [e]ffects" (Br. 7), and "[a]ny harms" from casino gambling "are offset by the industry's positive economic and social effects" (Br. 14). AGA's contentions and the material lodged by the AGA in support of those contentions are predictably one-sided. Their selective character may be appreciated by comparing AGA's submission with the literature cited above and the other materials previously lodged by the government. Moreover, much of AGA's own submission supports, rather than refutes, the existence of significant social and economic costs attributable to casino gambling.

For example, AGA has submitted a recent report prepared by the National Opinion Research Center (NORC) for the National Gambling Impact Study Commission.[5] Among other things, NORC conducted a survey of "the impact of increased access to legalized casino gambling" in ten communities. See *NORC Report* at 57. All but one of the surveyed communities reported an increase in debt problems or bankruptcies following the introduction of casino gambling; five

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[5] That Commission was created by Congress in 1996 to conduct "a comprehensive legal and factual study of the social and economic impacts of gambling in the United States." Pub. L. No. 104-169, § 4(a)(1), 110 Stat. 1484. The Commission's report is due by June 20, 1999. § 4(b), 110 Stat. 1484.

communities reported increases in youth crime; seven communities reported increases in "white collar crimes such as forgery and credit card theft"; six communities reported increases in domestic violence; "[a] number of social service staff across several communities" reported "an overall increase in 'family stress' due to gambling"; "[s]even communities reported either an increase in suicide since the casinos opened, or having seen cases where people ended their lives due to problems stemming from their gambling"; seven communities reported numerical increases in problem and pathological gambling; "every single case study [indicated] that substance abuse is a major problem in these communities," and "[m]any interviewees" attributed increased substance abuse to gambling. *Id.* at 62-64.

The *NORC Report* further states that "respondents in five [of the ten] communities opined that casinos * * * generate more problems for gamblers than other types [of gambling] such as the lottery or racetracks," and "[i]n only one of our case study communities did the [state] lottery seem to be a problem for a significant proportion of residents." *NORC Report* at 60. Interviewees in at least four communities concluded that casino gambling is more habitual than previously available gaming opportunities, so that those who do gamble, gamble more frequently and intensively. *Id.* at 63.

NORC's review of the economic consequences of problem and pathological gambling also confirms that gambling disorders impose significant societal costs. The *NORC Report* confirms that, like alcoholism, "inappropriate and/or excessive [gambling] participation * * * can extract an undesirable toll on individuals, family, friends, and the surrounding community." *NORC Report* at 33. NORC estimates that approximately 4 million adults are "lifetime" problem or

pathological gamblers, and 1 million to 1.5 million adults have engaged in problem or pathological gambling within the past year. *Id.* at 23. NORC further estimates that a typical problem or pathological gambler incurs recurring economic costs (separate and apart from his gambling losses) of $1,000-$2,000 per year, and generates non-recurring "lifetime" economic costs of about $5,000-$6,000 for himself and about $3,000 for his creditors. *Id.* at 33-35 (Tab. 1). When the number of adult problem and pathological gamblers is multiplied by NORC's per-gambler cost estimates, the result is billions of dollars in estimated economic losses.[6]

AGA's reasoning regarding the social benefits of gambling contains significant methodological shortcomings. For example, AGA's focus on economic benefits of casino-related jobs, wages, and tax revenues (Br. 14-16) ignores that dollars spent on gambling otherwise could, and presumably would, be spent on other goods and services. Although the introduction of legalized gambling unquestionably leads to increased employment, wages, and tax revenues in casino-related sectors, reductions in economic activity in other sectors necessarily result from the diversion of discretionary spending toward gambling. See *Gambling Hearing* at 371-373, 377 (GL 247-249, 253). Moreover, the studies cited by AGA focus on increases in employment and other indicators of economic activity in communities surrounding casinos; they do not measure the economic impact of casinos on non-casino jurisdictions. See, *e.g.*,

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[6] Other material lodged by AGA confirms the government's estimate of the size of the compulsive gambling problem, the particular danger compulsive gambling poses to youth, and the increasing rate of pathological and problem gambling. See Shaffer et al., *Estimating the Prevalence of Disordered Gambling Behavior in the United States and Canada: A Meta-analysis* iii-iv (1997).

NORC Report at 46-52. Casinos in destinations like Las Vegas and Atlantic City derive a high percentage of their revenues from tourists, effectively "importing" money that otherwise would be spent in other States or localities. AGA's analysis treats casino gambling expenditures as "found money"—a point of view that may be apt for the casino gambling industry, but not for the economy as a whole.

Casino gambling may well have benefits as well as costs, and the balance of costs and benefits is a matter of dispute. Indeed, it may be that a rational legislature could choose to tolerate gambling's costs in order to pursue its benefits. The government need not show otherwise to establish that Section 1304 does not impermissibly infringe on the First Amendment. The government need not establish the exact magnitude of casino gambling's social costs or the precise balance of costs and benefits. For purposes of *Central Hudson*, the government must only show that "the harms it recites are real" (*Edenfield* v. *Fane*, 507 U.S. 761, 771 (1993)), and that is plainly the case here.

B. Assisting States That Prohibit Casino Gambling

The application of Section 1304 to broadcast advertisements for casino gambling also serves another, equally substantial and longstanding federal interest—assisting States that prohibit casino gambling to protect their own residents. As of 1997, only 12 States authorized the operation of private casinos. See *North American Gaming Report 1997*, Int'l Gaming and Wagering Bus., July 1997, at S4-S31 (Colorado, Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, Nevada, New Jersey, New Mexico, and South Dakota). Private casino gambling remained unlawful in the remaining 38 States. States that prohibit casino gambling cannot protect their residents from the harms

caused by casino gambling in other jurisdictions without federal assistance. When a State wishes to discourage consumption by its residents of goods or services offered in other jurisdictions, "it does not have the option of direct regulation." *44 Liquormart*, 517 U.S. at 525 n.7 (Thomas, J., concurring in part and concurring in the judgment). And States cannot exclude broadcast advertising that originates in other States, because "broadcast signals, as a technological matter, cannot be confined to political boundaries." H.R. Rep. No. 1517, 93d Cong., 2d Sess. 20 (1974); *Fisher's Blend Station*, 297 U.S. at 655. As a result, without the assistance of the federal government, "non-casino states will have no effective means to protect their residents from [broadcast advertising] spillover." *Valley Broadcasting*, 107 F.3d at 1333.[7]

The federal government's interest in supporting the policies of States that restrict gambling was first articulated and endorsed by this Court in the *Lottery Case*. In discussing why Congress had prohibited interstate commerce in lottery tickets, the Court explained that Congress "said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce." 188 U.S. at 357. That same federal interest is one reason that Congress has

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[7] The inability of States to exclude or restrict broadcast casino gambling advertising that originates in other States distinguishes Section 1304 from the federal alcohol labeling law at issue in *Coors*. There, the Court held that the federal government did not have a "sufficiently substantial" interest in assisting States because "the Government has offered nothing that suggests that States are in need of federal assistance," but, distinguishing *Edge*, the Court acknowledged that federal intervention can be justified to assist States in restricting broadcast advertising. 514 U.S. at 486.

rejected proposals to legalize broadcasting of casino gambling advertisements. See, *e.g.*, 134 Cong. Rec. 12,281 (1988) (Rep. Wolf); S. Rep. No. 537, 98th Cong., 2d Sess. 11-12 (1984) (Sen. Hatch).

This Court's recent decision in *Edge* confirms that Congress has a substantial interest in assisting States to "discourage public participation," 509 U.S. at 534, by their residents in activities that those States have made illegal but which are legal in other States. After noting that "Congress has, since the early 19th century, sought to assist the States in controlling lotteries," *id.* at 421, the Court held that "we are quite sure that the Government has a legitimate interest in supporting the policy of nonlottery States" (*id.* at 426). Although the Court held that the government's interest in "not interfering with the policy of States that permit lotteries" was substantial as well (*ibid.*), that holding does not undercut the conclusion that the interest in supporting non-lottery States is substantial.

To the contrary, the Court stated that "[i]n response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries." 509 U.S. at 428. Petitioners therefore err in suggesting (Br. 19) that Congress must maintain impartiality between the interests of the majority of the States that prohibit casino gambling and the minority of States that permit it. If the Constitution does not obligate Congress to remain neutral with regard to state-operated lotteries, then *a fortiori*, neither does it require neutrality in federal regulation of private casino gambling.[8]

[8] The other arguments offered by petitioners and their amici against the government's interest in assisting States that prohibit casino gambling are equally unpersuasive. The argument that the statutory exceptions undercut that interest (Pet. Br. 19; NAB Br. 12-13) has the same fatal flaws as the argument that the exceptions undercut the interest in reducing the social costs of gambling. See pp. 23-25, *supra*. And the argument that the government cannot have a legitimate interest in suppressing truthful speech about a product in order to limit consumer demand (NAB Br. 10-11; Washington Legal Foundation (WLF) Amicus Br. 3-8) is inconsistent with *Central Hudson*, *Posadas*, and *Coors*, as well as *Edge*.

II. Section 1304 Directly Advances The Government's Interests

When a restriction on commercial speech rests on substantial governmental interests, the next question under *Central Hudson* is whether the restriction "directly advances the governmental interest[s] asserted." 447 U.S. at 566. The court of appeals correctly held that the application of Section 1304 to broadcast advertising for casino gambling directly advances both government interests in this case. Pet. App. 9a-10a, 32a-35a.

A. Section 1304 Reduces Gambling And Its Social Costs By Prohibiting Television And Radio Advertising Of Private Casino Gambling

1. Petitioners and their amici first argue that the government cannot establish the efficacy of Section 1304 because it did not submit record evidence demonstrating, presumably in some quantitative fashion, that Section 1304 materially advances the government's interests. Pet. Br. 23-25; NAB Br. 16-20; WLF Br. 9-15; Ass'n of Nat'l Advertisers, Inc. (ANA) Amicus Br. 27. This Court has never held, however, that a specific evidentiary showing is required in all circumstances to meet the government's burden under the third component of *Central Hudson*. To be sure, "mere speculation or conjecture" will not do. *Edenfield*, 507 U.S. at 770. But the Court has nevertheless indicated that, in appropriate circumstances, commercial speech restric-

tions may be justified "solely on [the basis of] history, consensus, and 'simple common sense.'" *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995). See also *Edge*, 509 U.S. at 428 (relying on "commonsense judgment"); *Metromedia*, 453 U.S. at 509 (White, J., joined by Stewart, Marshall & Powell, JJ.) (relying on "common-sense judgments"); *id.* at 541 (Stevens, J.) (joining relevant portion of plurality opinion).

The Court has long regarded the relationship between promotional advertising and consumer demand, and the corresponding effectiveness of promotional advertising restrictions in reducing demand, as axiomatic matters that do not require specific evidentiary support. In *Central Hudson* itself, "the Court recognized * * * that there was 'an immediate connection between advertising and demand for electricity.'" *44 Liquormart*, 517 U.S. at 500 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) (quoting *Central Hudson*, 447 U.S. at 569). And in *Edge*, which involved the same statute at issue in this case, the Court accepted Congress's "commonsense judgment" regarding the link between broadcast lottery advertising and lottery participation. 509 U.S. at 428. Those who purchase or sell promotional advertising—such as petitioners and their amici—are not well positioned to suggest nonetheless that such a link may not exist.

Both in *Central Hudson* and in *Edge*, the Court has held that restrictions on promotional advertising "directly advance" the government's objective of reducing demand without requiring any evidentiary showing to confirm that commonsense proposition. *Central Hudson*, 447 U.S. at 569; *Edge*, 509 U.S. at 428, 429-430, 434. See also *Posadas*, 478 U.S. at 341-342 (noting "reasonableness" of belief that advertising restrictions will suppress demand); *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 476 (1997) (noting that "[g]eneric

advertising is intended to stimulate consumer demand"); *id.* at 499-500 (Souter, J., joined by the Chief Justice & Scalia, J., dissenting) (terming "unremarkable" the "presumption that advertising actually works to increase consumer demand, so that limiting advertising tends to soften it"). As the Court explained in *Edge*, "[i]f there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced." 509 U.S. at 434. That reasoning applies with equal force here. Indeed, because *Edge* involved the very statute that is at issue here, the Court's reasoning in *Edge* is necessarily dispositive in this case.[9]

The Court's repeated recognition of the connection between promotional advertising and demand reflects common, ordinary experience. And it reflects the thinking of many economists, legal scholars, scholars of advertising, and social theorists and commentators. See, *e.g.*, Mitchell et al., *Basic Economics* 116 (1951); Samuelson, *Economics* 50-51 (1992); Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 65 (Nov. 1988); Pease, *The Responsibilities of American Advertising* 1 (1958); Packard, *The Hidden Persuaders* 17-19 (1980); Galbraith, *The Affluent Society* 155-156 (1958). Even economists who argue against advertising

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[9] The Court's acceptance of the connection between advertising and demand in *Edge* disposes of the attempt by NAB (Br. 17) and WLF (Br. 10-11) to write off the Court's holding in *Central Hudson* as limited to advertising by a monopolist. In any event, cabining *Central Hudson* in that fashion would not make sense. If advertising by a monopolist increases demand, then it is likely that advertising by all the producers in a competitive market will also increase overall demand, as well as help to allocate that demand.

restrictions acknowledge that a ban on advertising a product will, other things being equal, reduce consumption of the product. See, *e.g.*, Ekelund & Saurman, *Advertising and the Market Process: A Modern Economic View* 134 (1988).

2. Contrary to the claims of petitioners and their amici (Pet. Br. 23-25; WLF Br. 12-13; NAB Br. 19), the Court's intervening decision in *44 Liquormart* does not require the government to produce empirical evidence to prove in this case what the Court properly recognized as axiomatic in *Edge* and *Central Hudson*. Unlike *Central Hudson*, *Edge* and this case, *44 Liquormart* involved a prohibition on *price* advertising rather than a restriction on *promotional* advertising. In *44 Liquormart*, Rhode Island sought to defend restrictions on the advertising of retail liquor prices on the theory that the absence of price advertising would ultimately reduce liquor consumption. Rhode Island contended that advertising of price information would lead to increased price competition; greater price competition would lead to lower prices; and lower prices would stimulate higher demand. See 517 U.S. at 504-505. Four Members of the Court concluded that this attenuated series of causal links was not sufficient, in the absence of "any evidentiary support whatsoever," to establish that the advertising ban materially reduced liquor consumption. *Id.* at 505-507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.). That conclusion does not suggest, however, that an evidentiary showing is required to confirm the far more direct and obvious link between *promotional* advertising and consumption. Notably, Justice Stevens' opinion did not question the continuing authority of *Edge*, which relied on the relationship between promotional advertising and demand to hold

that the very statute at issue here satisfies the third part of *Central Hudson*.[10]

Requiring a specific evidentiary showing is particularly unwarranted where, as here, an advertising prohibition is directed at broadcast media. The Court has recognized that broadcasting is "a uniquely pervasive presence in the lives of all Americans," one that "confronts the citizen * * * not only in public, but also in the privacy of the home." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978). Broadcasting plays a uniquely powerful role in modern advertising, see Russell et al., *Kleppner's Advertising Procedure* 175 (10th ed. 1988), and restrictions on broadcast advertising are a correspondingly powerful means of affecting public demand for goods and services. For that reason, state-run lotteries spend about 90% of their advertising dollars on television and radio, and, when forced to cut their advertising budgets, have reduced print rather than broadcast advertising. See McQueen, *Penny Wise, Pound Foolish*, Int'l Gaming and Wagering Bus., Aug. 1996, at 50, 52.

Indeed, broadcast advertising is likely to be a particularly powerful force in attracting compulsive gamblers because of its "invasive" nature and ability to "take [a viewer] by surprise," *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 128 (1989), and to present "the advertiser's message in the most spectacular way possible, combining sight, sound, motion, and color" (Russell et al., *supra*, at 175). As even the Ninth

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[10] *Edge* was decided after *Edenfield*, which held that "speculation or conjecture" is insufficient to satisfy the government's burden under the third *Central Hudson* inquiry. See *Edenfield*, 507 U.S. at 770. *Edge* thus confirms that, even in the absence of an evidentiary showing, the fact that promotional advertising increases demand is more than a matter of "speculation or conjecture."

Circuit, which held Section 1304 to be unconstitutional in *Valley Broadcasting* for other reasons, acknowledged: "[b]y eliminating a potent means of persuasion, section 1304 would appear to advance directly the government's interest in discouraging public participation in commercial lotteries." 107 F.3d at 1334.[11]

3. Section 1304 also directly and materially advances the federal government's interest in assisting States that prohibit casino gambling. In the absence of Section 1304, non-casino States (such as Texas and Arkansas) would be exposed to broadcast casino advertising originating in adjacent States where casino gambling is permitted (such as Louisiana). Section 1304 entirely insulates non-casino States from broadcast casino advertising. See Pet. App. 10a. Tellingly, although petitioners argue at length that Section 1304 does not directly advance the federal government's interest in reducing the social costs of casino gambling, they make no reference at all to the effectiveness of Section 1304 in advancing the government's separate interest in assisting non-casino States.

[11] Were empirical evidence required, it would be ample. Cuts in Massachusetts' lottery advertising budget dramatically reduced what were previous large year-to-year increases in lottery sales. See McQueen, *supra*, at 52. Evidence that the government submitted in *Players Intenational, Inc.* v. *United States*, No. 98-5127 (3d Cir.), and which was not contested in that case, further demonstrates the connection between promotional advertising and gambling and its social costs, see, *e.g.*, GL 382-390 (Decl. of Robert Goodman, Executive Director, Gambling Research Institute), and the especially strong connection with respect to broadcast advertising and compulsive gamblers, see, *e.g.*, GL 391 (Goodman Decl.), 400 (Decl. of Valerie Lorenz, Executive Director, Compulsive Gambling Center, Inc.).

B. The Statutory Exceptions Do Not Prevent Section 1304 From Directly Advancing The Government's Interests

1. Petitioners and their amici next argue that the statutory exceptions to Section 1304 render the statutory scheme "irrational" and prevent it from advancing the government's interests. Pet. Br. 26-29; Valley Broad. Co. et al. (VBC) Amicus Br. 7-13; AGA Br. 22-25; NAB Br. 20-21; ANA Br. 28. There is nothing irrational, however, about the relationship between Section 1304 and its exceptions. To the contrary, Congress has "sensible reason[s] for drawing the line between those instances in which the government burdens First Amendment freedom in the name of the asserted interest and those in which it does not." *Wileman Bros.*, 521 US. at 493 (Souter, J., joined by the Chief Justice & Scalia, J., dissenting); see also *Metromedia*, *supra* (upholding prohibition on off-site signs even though on-site signs were permitted). In each instance, the exceptions to Section 1304 involve forms of gambling that either pose a lesser risk of social harm or offer substantial countervailing social benefits.

The principal exceptions to Section 1304 are for state-run lotteries and other government-conducted gambling (18 U.S.C. 1307(a)(1) and (2)(A)) and for Indian gambling conducted pursuant to IGRA (25 U.S.C. 2720). Those exceptions reflect an effort by the federal government to accommodate the sovereign interests of States and tribal governments that are directly engaged in the public operation of gambling activities—sovereign interests that are not implicated by private casino gambling. See, *e.g.*, S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988). The exceptions also reflect Congress's recognition that the net proceeds of state-run lotteries and Indian gambling accrue directly

to state and tribal governments and are devoted entirely to governmental purposes, but only a portion of the proceeds of private casino gambling reaches state and local governments as tax revenues.

In addition, state-run lotteries and Indian gambling are less likely to give rise to the social problems that are traditionally associated with casino gambling. For example, when Congress enacted the exception for state-run lotteries, it relied on testimony that the automated procedures used by those lotteries "operate to hinder organized criminal groups from infiltrating or stealing" from them. H.R. Rep. No. 1517, 93d Cong., 2d Sess. 6, 15-16 (1974); S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974). Moreover, state-run lotteries derive a relatively small share of their revenues from the kinds of "continuous play" games that are most conducive to compulsive gambling, but casinos depend heavily on slot machines and similar continuous-play gambling. See Christiansen, *Gambling and the American Economy*, 556 Annals Am. Acad. Pol. & Soc. Sci. 36, 39 (Mar. 1998) (Tab. 1). See also Sullivan, *By Chance a Winner: The History of Lotteries* 122-123 (1972); *NORC Report* at 60 ("[i]n only one of our [ten] case study communities did the [state] lottery seem to be a problem for a significant proportion of residents"). And though casinos operated by Indian tribes offer the same kinds of gambling as private casinos, Indian casinos are heavily regulated, see p. 6, *supra*, and the vast majority of Indian lands are located in relatively remote and sparely populated areas, see Bureau of Indian Affairs, U.S. Dep't of the Interior, *Indian Land Areas* (1992) (GL 409-421).[12] In contrast, non-Indian casinos are

[12] There are some exceptions to that general pattern, such as the Mashantucket Pequot Reservation in Connecticut, home to the Foxwoods Casino. But the validity of Section 1304 "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." *Edge*, 509 U.S. at 430 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989)).

typically situated in or near major cities such as New Orleans, Las Vegas, Atlantic City, St. Louis, and Detroit, where far larger populations have easy access to the gambling opportunities—and the attendant problems—that they present.[13]

The remaining exceptions to Section 1304 are equally rational. The exception for charitable gambling (18 U.S.C. 1307(a)(2)(A)), like those for state-run lotteries and Indian gambling, involves gambling in which the proceeds are devoted to public purposes. Moreover, the kinds of charitable gambling activities at which this exception is directed, such as "charitable raffles" and "church bingo games" (134 Cong. Rec. 31,075 (1988)), are manifestly different in their potential social costs from the multi-billion dollar commercial casino gambling industry. The exceptions for fishing contests (18 U.S.C. 1305) and "clearly occasional and ancillary" promotional contests (18 U.S.C. 1307(a)(2)(B)), such as car dealership drawings (134 Cong. Rec. 31,075 (1988)), cover only infrequent and inconsequential forms of gambling that do not result in appreciable expenditures and pose no discernible risk to public welfare. Finally,

[13] As described above, in *Edge*, this Court recognized Congress's valid interest in accommodating the interests of States that operate lotteries. See 509 U.S. at 426. Similarly, the Court has noted the "important federal interests" in "Indian self-government" and "encouraging tribal self-sufficiency and economic development." *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216-217 (1987). Given those legitimate interests, there is no merit to the argument of VBC (Br. 14-24) that the statutory scheme embodies impermissible discrimination based on the identity of the speaker.

sports betting and advertising of sports betting are subject to significant independent federal restrictions, see p. 7, *supra* (describing 28 U.S.C. 3701 *et seq.*), and the pool of legal sports bettors is significantly smaller than the pool of people who lawfully bet on games of chance. See Christiansen, *supra*, at 39 (Tab. 1) (parimutuel betting and other sports bookmaking account for less than 10% of total gross gambling revenues).

2. It is true that, taken collectively, the exceptions to Section 1304 expose the public to broadcast gambling advertising that it would not otherwise see. But that does not mean the exceptions therefore prevent Section 1304 from directly advancing the government's interests. To the contrary, *Edge* establishes that a restriction on advertising—indeed, the restriction on advertising at issue here—directly advances the government's goals as long as it substantially reduces the targeted advertising, even if it does not completely eliminate it.

In *Edge*, a North Carolina radio station that wished to broadcast advertisements for the Virginia lottery challenged the constitutionality of Section 1304 as applied to state-run lotteries. The North Carolina station argued that Section 1304 did not satisfy the direct-advancement requirement of *Central Hudson* because the station's North Carolina audience "listened to Virginia radio stations and television stations that regularly carried [Virginia] lottery ads," and "Virginia newspapers carrying such material also were available to them." 509 U.S. at 432. The station thus argued that permitting broadcast advertising in lottery States prevented the remaining restriction on advertising in non-lottery States from accomplishing its goal.

The Court acknowledged that North Carolina audiences would hear lottery advertising from Virginia stations, but held that, because Section 1304 nonetheless reduced the total amount of lottery advertising

reaching North Carolina residents, it directly advanced the goal of reducing lottery participation in non-lottery states. 509 U.S. at 432-434. In so holding, the Court stressed that "we [do not] require that the Government make progress on every front before it can make progress on any front." *Id.* at 434. And the Court emphasized that "[t]he Government may be said to advance its purpose *by substantially reducing lottery advertising, even where it is not wholly eradicated.*" *Ibid.* (emphasis added). See also *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 652 n.14 (1985) ("As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied."); *Metromedia*, 453 U.S. at 511 (White, J., joined by Stewart, Marshall & Powell, JJ.) (underinclusive restriction may still advance government objectives); *id.* at 541 (Stevens, J.) (joining relevant portion of plurality opinion).

The Court's reasoning in *Edge* and similar cases applies with equal force here. Private commercial casino gambling accounts for 40% of all gross gambling revenues in the United States—a larger percentage than any other category of gambling. See Christiansen, *supra*, at 39 (Tab. 1). By closing the airwaves to commercial casinos that account for 40% of all gambling revenues in the United States, Section 1304 satisfies *Edge*'s requirement of "substantially reducing" broadcast gambling advertising. Cf. *Edge*, 509 U.S. at 432 ("applying the statutory restriction [on lottery advertising] to Edge would directly serve the statutory purpose of supporting North Carolina's antigambling policy by excluding invitations to gamble from 11% of the radio listening time" in Edge's North Carolina listening area).

Contrary to the suggestion of petitioners and amicus AGA (Pet. Br. 29; AGA Br. 24-25), the Court's reasoning regarding the efficacy of Section 1304 in *Edge* was not predicated on the fact that Congress was attempting to balance the competing interests of lottery and non-lottery States. Instead, *Edge* holds without qualification that "substantially reducing lottery advertising" directly advances "the policy of decreasing demand for gambling." 509 U.S. at 434. Even if the holding in *Edge* had depended on the fact that Congress was also accommodating the interests of non-lottery States, here Congress, as we explained above, is also accommodating those interests, as well as the interests of tribal governments. If the exceptions resulted only in the redirection of the gambling to state- and Indian-run operations, they would advance valid government interests by supporting state and tribal fiscs and channeling gambling activity to operations with greater supervision and oversight.[14]

3. Petitioners and their amici also err in arguing (Pet. Br. 26; NAB Br. 21; VBC Br. 7-13; AGA Br. 23-24; ANA Br. 28) that this Court's decision in *Coors* undercuts *Edge* and compels the conclusion that the exceptions to Section 1304 render the statute unconstitutional. *Coors* does not question the Court's reasoning in *Edge*, much less overrule that decision. As we have noted, *Coors* held that a federal statute prohibiting the disclosure of alcohol content information on beer labels failed the third part of the *Central Hudson* test because it was an "irrational[]" means of pursuing the govern-

[14] Petitioners also incorrectly assert (Br. 28) that "the advertising at issue in *Edge* proposed a transaction that was illegal in the state where it was broadcast." To the contrary, the advertising at issue in *Edge* proposed the sale of Virginia lottery tickets in Virginia, a legal transaction. See 509 U.S. at 423.

ment's proffered interest in preventing strength wars. 514 U.S. at 488-490. The outcome in *Coors* simply reflects the "irrationality of th[e] unique and puzzling regulatory framework" that the Court found before it. *Id.* at 489. In *Coors*, the Court found that Congress had locked the back door but left the front door open: although brewers could not list alcohol content on beer labels, they were free to disseminate that information to consumers through other means, including promotional advertising, "a more influential weapon in any strength war." *Id.* at 488.

Here, in contrast, Section 1304 denies commercial casinos any access to television or radio to promote their gambling activities, and related statutory provisions limit other avenues of interstate advertising (see pp. 1-3, *supra*). Although Indian casino gambling and certain other gambling activities may be advertised on television and radio, Section 1304 excludes a major portion of the gambling industry from the Nation's airwaves. Thus, unlike the statute in *Coors*, Section 1304 and its statutory exceptions cannot be characterized as a scheme the "irrationality of [which] * * * ensures that the * * * ban will fail to achieve [its] end" (514 U.S. at 489).[15]

[15] This case is also significantly different from *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993). In *Discovery Network*, the Court invalidated a local ordinance that prohibited the use of sidewalk newsracks to distribute "commercial handbills" but did not extend the prohibition to the distribution of newspapers. The Court held that the ordinance did not satisfy the requirements of *Central Hudson* because "the distinction [between commercial and non-commercial publications] bears no relationship whatsoever to the particular interests that the city has asserted," and because the ordinance had "only a minimal impact on the overall number of newsracks on the city's sidewalks." *Id.* at 418, 424. Here, in contrast, the exceptions to Section 1304 involve forms of gambling

III. Section 1304 Is Not An Impermissibly Broad Restriction On Commercial Speech

The final question under *Central Hudson* is whether Section 1304 is "not more extensive than is necessary" to serve the government interests underlying the statute. 447 U.S. at 566. That inquiry is not a "least restrictive means" test. See *Board of Trustees* v. *Fox*, 492 U.S. 469, 477, 480 (1989); *Edge*, 509 U.S. at 429-430; *Florida Bar*, 515 U.S. at 632. Instead, the First Amendment requires only a "reasonable" fit between the regulatory means and ends. *Fox*, 492 U.S. at 480. The Court has insisted "only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 478 (internal quotation marks omitted). And the Court has "been loath to second-guess the Government's judgment to that effect." *Ibid.*[16]

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that entail fewer social costs as well as countervailing social benefits, and the exceptions do not prevent Section 1304 from substantially diminishing the amount of broadcast gambling advertising.

[16] "If alternative channels permit communication of the restricted speech, the regulation is more likely to be considered reasonable." *44 Liquormart*, 517 U.S. at 529-530 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment); *Florida Bar*, 515 U.S. at 633. Federal law does not entirely disable casinos from engaging in promotional advertising. Although Section 1304 prohibits broadcast advertising of casino gambling, and other statutory provisions restrict interstate distribution of other forms of gambling advertising (see pp. 1-3, *supra*), federal law does not generally restrict the *intra*state advertising of legal casino gambling in non-broadcast media, such as local newspapers, magazines, leaflets and billboards. The decision not to regulate those "alternative channels" of communication represents a tailoring of the federal regulatory scheme to the advertising media that pose the greatest threat to the governmental interests underlying Section 1304, while leaving open adequate channels by which casinos can convey to consumers "information as to who is

In *44 Liquormart*, this Court held that Rhode Island's ban on liquor retail price advertising was impermissibly restrictive because Rhode Island's goal of raising liquor prices could be achieved more effectively through regulatory alternatives that did not involve restrictions on commercial speech. See 517 U.S. at 507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) ("perfectly obvious" that "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal"); *id.* at 530 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment) ("other methods at [Rhode Island's] disposal" would "more directly" and "far more effectively" raise liquor prices).

Here, petitioners and their amici first suggest that the government could "outlaw" casino gambling altogether. Pet. Br. 32; AGA Br. 29; NAB Br. 25. But that suggestion proves too much. Within the broad limits of the Commerce Clause, Congress has the constitutional authority to prohibit virtually any commercial activity that it believes produces harmful results, other than commercial transactions involving constitutionally protected activity. State governments likewise are generally free, in the absence of countervailing federal law, to prohibit any commercial activity that they deem to be harmful to the public. As a result, to hold that outlawing disfavored commercial activity is a "less restrictive alternative" to regulating promotional advertising would be tantamount to holding that the First Amendment disables the government from restricting promotional advertising alto-

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producing what product, for what reason, and at what price." *44 Liquormart*, 517 U.S. at 496 (plurality opinion) (internal quotation marks omitted).

gether. The Court has repudiated the notion that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling" (*44 Liquormart*, 517 U.S. at 510 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.) (quoting *Posadas*, 478 U.S. at 345-346)); it would be equally ill-advised for the Court to stand that maxim on its head by holding that the power to ban casino gambling categorically *excludes* the power to regulate casino advertising.

Moreover, it is by no means obvious that an outright prohibition on casino gambling would, in fact, be "more likely to achieve the [government's] goal[s]." *44 Liquormart*, 517 U.S. at 507 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.). Prohibiting a commercial activity does not necessarily mean that the activity ceases; instead, it may simply be driven underground, in the form of a black market for the proscribed product or service. As the Nation's experience during Prohibition shows, black markets may give rise to their own social costs, including greatly expanded opportunities for organized crime and other forms of criminal activity that create major enforcement burdens. Compare *id.* at 530 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment) (regulatory alternatives to Rhode Island's advertising ban would entail "comparatively small additional administrative cost"). In the end, petitioners' hypothesized federal ban on casino gambling might well end up exacerbating, rather than diminishing, some of the problems that led to the enactment of Section 1304. And an outright nationwide ban would obviously impinge far more directly on the authority of the States to regulate gambling activity within their borders—authority that petitioners elsewhere profess to defend (see Pet. Br. 19).

Petitioners and their amici next suggest (Pet. Br. 32; AGA Br. 29; NAB Br. 25) that the government sponsor "counter-speech," such as public service announcements, informational brochures, and educational displays. It is, however, entirely speculative—rather than "perfectly obvious" (*44 Liquormart*, 517 U.S. at 507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.))—that such counter-speech "would be more likely" to achieve the government's goals (*ibid.*). It is particularly improbable that counter-speech would have a meaningful impact on the problem of compulsive gambling. Compulsive gambling is an impulse control disorder; compulsive gamblers place themselves (and others) in jeopardy not because they are ignorant of the risks of gambling, but because they cannot control their behavior in the face of known risks. See American Psychiatric Ass'n, *supra*.[17] Moreover, whatever gains might otherwise be realized through counter-speech and other educational efforts could be negated if the casino industry were free to bombard susceptible persons with unrestricted television and radio advertising.

Finally, petitioners and their amici (Pet. Br. 32; AGA Br. 29; NAB Br. 25) propose that the government support various remedial programs, such as treatment programs for compulsive gamblers and "crisis and intervention services." Such services, however, are already widely available, often as part of the existing regulatory schemes of States that permit casino gambling. See, *e.g.*, La. Rev. Stat. Ann. §§ 28:841-28:842 (West Supp. 1999) (creating Compulsive and Problem Gaming Fund and establishing state-operated

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[17] The *NORC Report* cited by amicus AGA states that "a substantial proportion" of problem and pathological gamblers "believe that the overall effect of legalized gambling on society is either bad or very bad." *NORC Report* at 28.

information, referral, and treatment services for compulsive and problem gambling); N.J. Stat. Ann. §§ 5:12-145, 26:2-169 (West 1996) (state-funded treatment programs for compulsive gamblers). Those services are unquestionably important in dealing with the social costs of casino gambling. But they are a complement to Section 1304, not an alternative to it. Programs that treat compulsive gamblers and provide crisis intervention are, by necessity and design, after-the-fact services that address problems already in existence. Section 1304, in contrast, is designed to reduce the incidence of those problems prospectively, by curtailing the demand that leads to compulsive gambling and other social costs of gambling activities.[18]

IV. If The Existing Record Is Inadequate To Resolve The Constitutionality Of Section 1304, The Case Should Be Remanded For Further Proceedings

For the reasons we have explained, we submit that this Court's commercial speech precedents such as *Central Hudson* and *Edge* permit the government to establish the constitutionality of Section 1304 without the kind of evidentiary showing that petitioners demand (Br. 13-17, 22, 24-25). If the Court nevertheless determines that the record is not sufficiently developed to justify the Fifth Circuit's affirmance of the district court's grant of summary judgment to the government,

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[18] Evidence submitted by the government in *Players International, Inc.* v. *United States*, No. 98-5127 (3d Cir.) and lodged with the Court demonstrates in more detail why the measures discussed above and other measures not raised by petitioners here are inadequate alternatives to Section 1304. See, *e.g.*, GL 401-402 (Lorenz Decl.); Arcuri et al., *Shaping Adolescent Gambling Behavior*, 20 Adolescence 935, 937-938 (Winter 1985) (GL 440-441) (large percentage of minors at Atlantic City high school gambled in casinos; identification of compulsive gamblers is difficult).

the Court should vacate the judgment and remand the case for further proceedings before the district court. See 28 U.S.C. 2106 (Court may "vacate * * * any judgment, decree, or order of a court" and "remand the cause" for "such further proceedings * * * as may be just under the circumstances").

The evidentiary record in this case was established five years ago, at a time when the continuing authority of this Court's decision in *Posadas* had not been called into question, and when the Court recently had sustained the constitutionality of Section 1304 as applied to state lottery advertising in *Edge*. In a subsequent suit involving the constitutionality of Section 1304, *Players International, Inc.* v. *United States*, No. 98-5127 (3d Cir.), which was commenced after this Court's partial repudiation of *Posadas* in *44 Liquormart*, the government presented a more extensive evidentiary submission regarding the operation and effect of Section 1304; and, as mentioned above, copies of the appendix before the court of appeals in that case have been lodged with the Court. That appendix includes declarations from experts regarding the impact of broadcast advertising on demand for casino gambling; the role of broadcast advertising in compulsive gambling behavior; the relative social costs of casino gambling and other forms of gambling; and the effectiveness of proposed regulatory alternatives to advertising restrictions. See GL 379-402.

The declarations presented in *Players* have never been considered in this case, and, although we have referenced them briefly (notes 11 & 18, *supra*) to illustrate the kind of evidence that is available, we do not urge the Court to rely on them in the first instance here. Instead, if the Court regards the existing record as incomplete because of intervening jurisprudence, the Court should remand to the district court so that the

constitutionality of Section 1304 can be resolved in light of the kind of expert evidence presented in *Players*. For the Court instead to direct a judgment in petitioners' favor on the ground that the record is inadequate to establish the constitutionality of Section 1304 as applied to petitioners would necessarily leave the underlying constitutionality of Section 1304 unresolved. Unless the Court were prepared to hold that *no* evidentiary record could sustain the constitutionality of the statute—a holding that would entail a substantial and unwarranted departure from the Court's existing commercial speech precedents—remanding for further proceedings would be the most appropriate response if the current record were found to be incomplete. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 668-674 (1994); *Storer* v. *Brown*, 415 U.S. 724, 738-746 (1974); *Askew* v. *Hargrave*, 401 U.S. 476, 478-479 (1971) (per curiam).

CONCLUSION

The judgment of the court of appeals should be affirmed. If the Court determines that the record is insufficient to support the judgment, the judgment should be vacated and the case should be remanded for further proceedings before the district court.

Respectfully submitted.

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